



# ***TEXAS DEPARTMENT OF BANKING***

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## **SUPERVISORY MEMORANDUM – 1035**

**DATE:** May 1, 2013

**TO:** Foreign Money Transmitters

**FROM:** Charles G. Cooper, Banking Commissioner

**SUBJECT:** Licensing of Foreign-Located Money Transmitters Under Texas Finance Code Chapter 151 (the Money Services Act)

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### **Background**

It has become relatively easy and inexpensive to operate a website that accepts payments, and to therefore reach consumers across the world. As a result, an increasing number of money transmitters operate exclusively through the Web, allowing Texas consumers to use their services irrespective of where the company is located. This issue has been discussed among multiple states through MTRA and CSBS with no policy consensus emerging. While the states differ in their approaches to foreign-located money services businesses (MSBs), the Financial Crimes Enforcement Network of the U.S. Treasury Department (FinCEN) has made it clear that Bank Secrecy Act (BSA) rules apply to all persons offering MSB services in the U.S. from foreign locations. Specifically, FinCEN issued a final rule in 2011 and a follow-up guidance in 2012, which establish that foreign-located MSBs must register with FinCEN, implement anti-money laundering (AML) programs, and appoint an agent in the US for service of legal process. The Department's policy regarding such foreign-located money transmitters has developed over time as changes in underlying jurisdictional and international licensing issues have evolved. This Supervisory Memorandum clarifies and formalizes the Department's policy in this matter.

### **Prescriptive Jurisdiction**

Prescriptive jurisdiction is the authority of a state or country to apply its law to people, activity, or things. Texas must have prescriptive jurisdiction in order to apply the money transmission licensing provisions of the Money Services Act. A state generally has prescriptive jurisdiction over entities located within the state. But when an entity is located out of state, a substantial amount of case law has established the circumstances under which a state may exert prescriptive jurisdiction. A full review of the law is beyond the scope of this memorandum, but it can be generally stated that Texas may exert prescriptive jurisdiction over a money transmitter that operates an interactive website through which a Texas consumer might communicate with the company, sign up for accounts, and send money through the website.<sup>1</sup> International law generally allows a state or nation to extend its

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<sup>1</sup> *1 FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (C.A.D.C. 1980) (holding that a state may exert prescriptive jurisdiction when the out-of-state entity's conduct has or is intended to have substantial effects within the state); *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945); *Zippo Mfg. Co. v.*

prescriptive jurisdiction over foreign entities based either on the nationality of potential victims, or on acts which produce detrimental effects within its borders.<sup>2</sup> Therefore it is the Department's position that any money transmitter who allows Texas consumers to initiate transactions through its website is subject to the licensing requirements of the Money Services Act, regardless of where the transmitter is physically located.

### Licensing of Foreign Entities

When a foreign MSB has no physical presence, employees, or agents within the U.S., but transmits money for persons located in Texas through a website, it must obtain a money transmission license under the Money Services Act or cease conducting business for persons located in Texas. Because certain requirements to obtain and maintain a license established by the Money Services Act and Title 7 of the Texas Administrative Code (7 TAC), Chapter 33, are based on standards specific to the U.S., and also because of the increased difficulty obtaining documentation from foreign sources, a foreign MSB that applies for a license must take certain additional steps to ensure that the Department can evaluate and oversee the MSB on terms substantially equivalent to a U.S.-based entity. Specifically, in addition to the standard requirements, the following conditions are required of foreign MSBs in order to obtain and maintain a money transmission license.

1. *English documentation.* Finance Code § 151.602 requires that all records must be kept in English and financial information denominated in U.S. dollars. All documentation required for the license application, examinations, and other filings must be provided in English, with financial figures denominated in U.S. dollars. If a foreign license holder routinely keeps the records required by § 151.602 in a language other than English, English translations must be made available.
2. *Documentation regarding regulation at home.* If the foreign-located MSB is currently regulated in its home country, it must provide documentation of good standing with the regulator there. The documentation should include how long the entity has been licensed or regulated by the regulator. If regulated in other countries as well, documentation of good standing in those jurisdictions must also be provided.
3. *Registration with FinCEN.* The entity must register as a money transmitter with the Financial Crimes Enforcement Network of the U.S. Department of Treasury.<sup>3</sup>
4. *Accounting standards for financial records.* Finance Code § 151.304(b)(2) requires an applicant to submit audited financial statements in order to determine that the applicant meets minimum net worth requirements. Under Finance Code § 151.307, an applicant's net worth must be calculated in accordance with generally accepted accounting principles (GAAP). Finance Code § 151.602 further requires that a license holder maintain a ledger in accordance with GAAP. A foreign entity must calculate its net worth either in accordance

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*Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997) (establishing a sliding scale test under which an interactive website that allows a consumer to exchange information with a host computer and conduct commercial activity triggers prescriptive jurisdiction). *See also American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F.Supp.2d 895 (N.D. Tex. 2000).

<sup>2</sup> *See U.S. v. Smith*, 680 F.2d 255, 257-58 (1st Cir. 1982).

<sup>3</sup> Refer to FinCEN Guidance FIN-2012-A001 for the specific requirements of FinCEN under the Bank Secrecy Act, available at [http://www.fincen.gov/statutes\\_regs/guidance/html/FIN-2012-A001.html](http://www.fincen.gov/statutes_regs/guidance/html/FIN-2012-A001.html).

with the GAAP established and maintained by the U.S. Financial Accounting Standard Board, or in accordance with the International Financial Reporting Standards (IFRS) maintained by the International Accounting Standards Board. The audited financial statements, the ledger, and all other related financial records required by statute or rule must likewise be denominated in U.S. currency and be prepared in accordance with either U.S. GAAP or IFRS.

5. *Accountant.* Audited financial statements must be prepared by either a U.S.-based certified public accountant (CPA), or by an accountant who has been positively evaluated by the International Qualifications Appraisal Board and has passed the Uniform CPA Exam.
6. *Background checks.* Finance Code § 151.203 and 7 TAC § 33.13 authorize the Commissioner to require background checks for a license application. Search firm reports must be conducted on all controlling individuals, executive officers, directors, general partners, trustees, or managers by an acceptable, independent search firm. These search firm reports must conform to the requirements described in Appendix A of the application forms provided by the Department.
7. *Security bond.* Finance Code § 151.308 requires an applicant to provide, and a license holder to maintain, security in the form of a surety bond, an irrevocable letter of credit, or a deposit that conforms to § 151.308. A foreign license applicant must obtain the required security from an entity with a physical location in the U.S., and that is authorized to do business in Texas.
8. *Examination.* A foreign license holder must provide a location in Texas where examinations can be conducted. In the event of multistate examinations, the Department may agree to a U.S. site that is located outside Texas. The license holder must make all documents required for examination available at this location for the duration of the examination, and must make arrangements for at least one English-speaking employee to be present to assist with the examination.